FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON 25, D. C.

March 16, 1962

IN REPLY REFER TO:
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Honorable Oren Harris
Chairman, Committee on Interstate
and Foreign Commerce
House of Representatives
Washington 25, D.C.

Dear Chairman Harris:

At the March 6th hearing before your Committee on H.R. 8031 and other bills, it was requested that the Commission submit its views on four questions, dealing with the effect of the enactment of all-channel TV receiver legislation on Commission proceedings proposing to deintermix particular areas to all-UHF. The questions and our views thereon are set out below.

1. Is the Commission in a position to make a representation to the Committee that if legislation providing for all-channel receiving sets is enacted, the Commission would postpone any further consideration of all deintermixture until such time as it could see from experience how the all-channel receiver authority will work out -- perhaps five, six, seven years? (Tr. 201). The Commission, after study, has made the following judgment: The Commission would regard enactment by this Congress of the all-channel receiver legislation as a major change in the circumstances affecting its deintermixture proposals and as a major factor to be considered in determining whether or not the public interest would be served by deintermixing any of the communities now under consideration. As the Commission made clear in its Statement of March 6th, we do not conceive of selective deintermixture as a general or long-range solution for the television allocations problem. Rather, we believe that we will need a system using both UHF and VHF channels, and that all-channel receiver legislation is the basic and essential key to that long-range goal. For with this legislation, time would begin to run in favor of ~~the~~ UHF development. The UHF operator (both commercial and educational) could look forward to UHF receiver saturation not only in his home city but in the surrounding rural area as well, and could expect

staff have devoted more time and effort to this question than to any other with which we have been faced. We have concluded that the public interest clearly requires expanded use of the 70 UHF channels for television broadcasting; that receiver incompatability is a major factor inhibiting such expanded use; that legislation which would permit the Commission to require the distribution of all-channel receivers is the most feasible means available for fostering UHF growth, and that failure to enact such legislation would not only continue and magnify present inequities and monopolistic tendencies, but also cause ever-growing pressures to relieve the shortage in television stations, which, in turn, may result in the erosion of technical standards to squeeze-in more VHF stations and even Government rationing of time on stations.

Based upon these conclusions, we have earnestly recommended enactment of this legislation as being of utmost importance to the national welfare. I am enclosing for your information the text of the statutory language we have proposed, as well as the justification for the proposal, which sets forth in somewhat more detail the reasons for its submission. There is also enclosed a copy of a statement concerning television allocations which was presented to Congress by the then Chairman of the Commission in 1959.

With this background, I should like to turn to the specific objections which your Department has raised concerning the proposal. You express concern that this legislation would establish an unfortunate precedent by substituting Government regulation for the public's freedom to choose among manufactured products where no considerations of public health and safety are involved. The powers of Congress to legislate in this field are not, of course, constitutionally limited to matters affecting public health and safety. Moreover, however sound the policy may be to limit Federal Government control over most manufactured products to health and safety considerations, I do not believe it is or can be the controlling policy in the present case. What must control here is the Congressional policy enunciated in the Communications Act to encourage the larger and more effective use of the radio frequency spectrum. That policy clearly is not based primarily on considerations of health and safety, but rather on the same considerations which form the basis for all Federal Government control of radio, i.e., the status of the radio frequency spectrum as a vital national resource and as a most important instrumentality of interstate and foreign commerce.

We are concerned with a product, the television receiver, which plays an indispensable role in the use of one of our most important channels of interstate commerce; namely, that portion of the radio spectrum allocated for television broadcasting. The primary basis for Congressional action on this proposal is

improvement in the quality of the UHF portion of the receivers in the hands of the public. With increased use of UHF, and increased incentive for both equipment manufacturers and station operators to exploit its maximum potential, there is reason to believe that several of the problems which presently restrict the coverage of UHF stations would be overcome. Statement of March 6th, pp. 13, 17.

In short, as we stated in our Notice of Proposed Rule Making in Docket No. 14229, the all-channel receiver is "critically important" because it is directed squarely to "the root problem of receiver incompatibility". It is our hope and belief that the achievement of set compatibility will make possible a satisfactory system of intermixed assignments, and immeasurably promote educational TV. Statement of March 6th, pp. 20-21. It will enhance the development of three fully competitive network services and perhaps eventually of still further network service. For these reasons, the Commission makes the representation to your Committee that if the all-channel receiver TV legislation is enacted by this Congress, it is the judgment of the Commission (with the qualification noted in 4, infra) that it would be inappropriate, in the light of this important new development, to proceed with the eight deintermixture proceedings initiated on July 27, 1961, and that, on the contrary, a sufficient period of time should be allowed to indicate whether the all-channel receiver authority would in fact achieve the Commission's overall allocations goals.

The argument has been made that the Commission is not in a position to transmit this judgment to the Congress for two reasons: (1) that such action would contravene the principle set forth in the Sangamon Valley decision (269 F. 2d 221 (C.A.D.C.)); and (2) that under the Communications Act, the Commission is required to go forward to a resolution of the deintermixture proceedings on their merits. We do not believe that either argument has merit. As to the second, the Commission has in the past suspended or terminated its processes because of the emergence of new overriding factors not foreseen at the time of institution of those processes. We think such decisions to defer or postpone action fall within the discretion of the Commission (cf. Coastal Bend Television

Corp. v. U.S., 234 F. 2d 686 (C.A.D.C.)), subject, of course, to review by the courts to determine whether the action is arbitrary. We regard our position in this instance as wholly reasonable in the light of the considerations set out in the prior paragraph.

As to the Sangamon Valley question, the Commission is well aware of its responsibilities under this decision. Thus, as we made clear in our recent testimony before your Committee (and were sustained by the Chairman of the Committee -- see, e.g., Tr. 281-82, 285), the Commission cannot and will not take into account nonrecord presentations by interested parties, or those acting on their behalf, as to the issues in the pending proceedings (such as the amount of "white area" that would result from any deintermixture action). But Sangamon Valley does not preclude Congressional inquiry, in connection with pending legislation, as to possible overall Commission action in the event of enactment of that legislation, nor does it preclude the Commission from supplying to the Congress such information of an overall nature as Congress deems necessary in its consideration of the legislation. The facts of Sangamon Valley involve, we believe, the wholly different question of ex parte presentations by an interested party made in the offices of Commissioners on the particular merits of the pending rule making proceeding.

In short, we believe that it is wholly proper to transmit this judgment to the Committee. We wish to make clear that in doing so, we are not foreclosing fair consideration of any further pleadings in these proceedings (such as a petition for reconsideration under Section 405 of any final order issued by the Commission). Under the law such pleadings must be considered on their merits and they will be so considered. But, in connection with your consideration of pending legislation, you have asked for the Commission's judgment as to what it would do in the event of enactment of the all-channel receiver legislation by the Congress, and we have given you that judgment.

2. In connection with the foregoing matter, would the Commission also make the further representation that before any general policy concerning deintermixture would be undertaken at the conclusion of the moratorium period, this Committee would be advised? (Tr. 202). The Commission does make this representation. The Commission would

give the Committee and other interested Congressional committees periodic reports during any moratorium period decided upon. Before undertaking the implementation of any policy concerning deintermixture, the Commission would advise the Committee of its plans and give it an appropriate period of time to consider the Commission's proposals.

3. Would the Commission consider a moratorium written into the law and providing that the Commission will not take any further action looking to deintermixture of an area to all-UHF until the Congress permits such action? (Tr. 202-203). As we understand this proposal, a statutory prohibition against any Commission action shifting a VHF operator to UHF in order to effectuate an all-UHF area, would continue until ended by action of both Houses of Congress. The Commission does not favor this approach. For, it means, in effect, that if the all-channel legislation proves inadequate, and the Commission feels that some form of deintermixture is desirable in order to achieve the purposes of the Communications Act (e.g., Sections 1, 303(g)), it would have to seek the equivalent of an amendment to the Act. In our opinion, such a statutory scheme would render administrative policy inflexible and ineffective.

The Commission hopes and believes that the all-channel legislation will achieve its goal and make possible "a satisfactory system of intermixed assignments" (par. 10, Notice of Proposed Rule Making, Docket No. 14229). But if it does not, the agency clearly has the duty to take further action. For, such action will have to be based on evaluation of complex economic and engineering factors. It is for this reason -- to facilitate action taken after this kind of evaluation -- that Congress created the agency. Congress recognized the desirability of delegating to the Commission the task of sifting the factors involved in complex allocations proceedings such as a Sixth Report and Order or a Clear Channel Report and Order. It therefore gave the Commission the broadest flexibility to deal with this dynamic industry. F.C.C. v. Pottsville Bctg. Co., 309 U.S. 134, 137-38; NBC v. U.S., 319 U.S. 190, 215-219.

Under this proposal (Tr. 202-03), however, the Commission would be stripped of much of its flexibility at the critical period when it was most needed. We fully recognize that in the event the all-channel legislation

falls short of achieving its goals, Congress will want to carefully consider any Commission proposals. We would welcome such consideration. But if Congress restricts the Commission's discretion in this vital area, then it must act itself. The responsibility for development of the nationwide television system would then rest with the Congress, and, contrary to sound and well-established tradition and policy, the agency will have only the most limited role and discretion.

For these reasons, we strongly urge that the Commission not be deprived, in this area, of the broad discretion which Congress gave it to meet changing problems and circumstances. We believe that there is no reason for not following the established policy of over a quarter of a century of permitting Commission action under the public interest standard, subject to Congressional and judicial review. See Statement of March 6th, p. 18.

4. With respect to any moratorium would deintermixture proceedings such as the Springfield, Ill. proceedings fall into the same category as the eight deintermixture proceedings proposed last July 27th? (Tr. 320). For reasons fully developed in the attached appendix, the Commission believes that any agency moratorium (see 1) on deintermixture to all-UHF would not be applicable to the deintermixture proceedings in (1) Springfield, Ill., (Docket No. 14267), (2) Peoria, Ill., (Docket No. 11749), (3) Bakersfield, Calif., (Docket No. 13608) and (4) Evansville, Ind., (Docket No. 11757).

We hope that the foregoing and the attached appendix make clear our views. If, however, your Committee has any further questions, we shall be glad to answer them.

Thank you again for permitting us to state so fully our views on this most important matter. We greatly appreciate the Committee's efforts on behalf of this legislation (H.R. 8031), so essential to the development of the truly nationwide TV system described in our Statement of March 6th.

BY DIRECTION OF THE COMMISSION*

Newton N. Minow
Chairman

*See next page

*Commissioner Lee maintains his position as set forth in his statement before the Committee.

Because of his former connection (prior to nomination as Commissioner) as engineering consultant in regard to the deintermixture of Springfield and Peoria, Illinois, Commissioner T.A.M. Craven did not participate in the consideration of the Commission's comments in this letter with respect to those areas. Otherwise, Commissioner Craven concurs with the views of the Commission majority.

# APPENDIX

Applicability of any deintermixture moratorium to the Springfield, Ill., Peoria, Bakersfield, and Evansville deintermixture proceedings.

This appendix deals with the applicability of any moratorium on Commission deintermixture action (to all UHF operation) to the deintermixture proceedings in (1) Springfield, Ill. (Docket No. 14267), (2) Peoria, Ill. (Docket No. 11749), (3) Bakersfield, Calif. (Docket No. 13608 and (4) Evansville, Ind. (Docket No. 11757). For reasons developed within, the Commission believes that any such moratorium should be inapplicable to these proceedings.

1. Springfield, Ill. Deintermixture proceeding (Docket No. 14267). On March 1, 1957 the Commission issued an Order in the rule making proceeding in Docket No. 11747, which removed Channel 2 from Springfield, Ill., and added it at St. Louis, Mo., and Terre Haute, Ind., and further assigned UHF Channels 26 and 36 to Springfield (22 F.C.C. 318). The Commission's Order also modified the existing authority of Signal Hill Telecasting Corporation, the then licensee of Channel 36 in St. Louis, to provide for temporary operation on Channel 2. This Order was affirmed by the Court of Appeals (Sangamon Valley Television Corp. v. U.S., 255 F. 2d 191 (C.A.D.C.), but the Supreme Court remanded the case to the Court of Appeals for consideration of certain ex parte activities which had occurred during the rule making proceedings before the Commission (356 U.S. 49). The Court of Appeals remanded the case to the Commission for a determination of the nature and source of all ex parte pleas (269 F. 2d 221). The Commission, after ascertaining such pleas, proposed to give interested parties an opportunity to respond to them but not to comment on matters occurring subsequent to March 1, 1957.

On appeal, the Department of Justice took issue with this latter ruling, urging that the Commission must consider post-1957 facts "if it is to reach a proper rule making decision as to where the VHF Channel 2 should be allocated for the future" (Brief, p. 8). The Commission, in its brief, pointed out that "consideration of subsequent events might well have to include

existing service to the public in St. Louis . . ." (p. 18). The Court agreed with the Department and ordered the Commission "to conduct an entirely new proceeding", based on the facts as they now exist; it further stated that the existing service on Channel 2 in St. Louis may be continued by the Commission during this new proceeding. 294 F. 2d 742. On September 7, 1961 the Commission instituted the new proceeding (Docket 14267).

We have set out this lengthy history to show that the Springfield, Ill. deintermixture proceeding does not stand on the same footing as the eight deintermixture proceedings initiated last July. If a general moratorium prevents deintermixture in these proceedings, it rightly or wrongly maintains the status quo in these areas. But a moratorium precluding deintermixture in Springfield would, as a practical matter, upset the status quo. For, as the Court recognized, the facts are that since 1957 Springfield has been all-UHF and Channel 2 has been serving the St. Louis area. Without any consideration of the merits of the matter, the moratorium thus would automatically withdraw Channel 2 from service in St. Louis (and from assignment to Terre Haute where, however, it has been the subject of a comparative hearing) and call for VHF operation in Springfield. We think that such an automatic application of a general moratorium is unsound and that the matter rather should be left to the Commission's judgment. And see Section 402(h), Communications Act. It may be that in spite of the dislocation we have described, the Commission might conclude in Docket 14267 that the public interest would not be served by ordering deintermixture of Springfield. But certainly that decision is one calling for a judgment on the basis of all the public interest factors -- and not for automatic application of any general deintermixture moratorium. This conclusion is buttressed by the domino-effect of a moratorium precluding deintermixture of Springfield on the Peoria, Ill., deintermixture case, to which we now turn.

2. Peoria, Ill. Deintermixture case (Docket No. 11749). The Commission in a Report and Order issued March 1, 1957 deintermixed the Peoria area, substituting a UHF channel for Channel 8 which was reassigned to the Davenport-Rock Island-Moline metropolitan area in order to afford "a third VHF outlet in this major market"

(Docket 11749, 22 F.C.C. 342).1/ On appeal, the Court of Appeals affirmed the Commission's Order (WIRL Television Co. v. U.S., 253 F. 2d 863 (C.A.D.C.); the case was, however, subsequently remanded to the Commission, not because of any error or because of ex parte factors, but because the Commission's decision was geared, to some extent, to the Springfield deintermixture proceeding 2/ and accordingly might be affected by a different decision in that proceeding. Since the Commission is to reconsider the Springfield matter, the rule making with respect to Peoria also was remanded to the Commission, so that it could be reconsidered, if necessary, in the light of the new Springfield decision. See WIRL Television Co. v. U.S., 274 F. 2d 83 (C.A.D.C.).

This means that if a general moratorium causes the Commission to reject deintermixture of Springfield, the Peoria deintermixture action would have to be reconsidered in the light of this new factor. But the same moratorium would prevent the Commission from reevaluating and making a new judgment as to whether Peoria should be deintermixed. The actual status quo in Peoria would thus be disturbed without any consideration of the merits of the case. It may be that it should be so disturbed. But it may also be that the Commission would not regard a reversal of the Springfield

1/ This channel assignment to Davenport-Rock Island-Moline has been the subject of a comparative hearing, which is not yet completed; instructions as to the final decision were announced on June 29, 1961, Community Telecasting Corp., Docket No. 12501.

2/ In a footnote in the Peoria Report, the Commission stated (22 F.C.C. at 352, n. 15): "Our action herein, moreover, comports with our decision in the Springfield deintermixture proceeding (Docket No. 11747). In that case we have concluded that the public interest would be served by deleting Channel 2 from Springfield. A station on this frequency in Springfield would have provided VHF service to parts of the service areas of the UHF stations in Peoria; and conversely a station on Channel 8 in Peoria would provide VHF service to portions of the area that will be served by UHF stations in the Springfield-Decatur area, which the Commission believes should be all-UHF."

picture -- referred to only in a footnote in the Commission's Peoria decision (see fn. 2, supra) -- as requiring a different result. Here again, the matter is obviously one for judgment -- not rigidity.

3. Bakersfield, California (Docket No. 13608). On March 27, 1961, the Commission issued an Order deintermixing Bakersfield by substituting UHF 23 Channel for Channel 10, effective December 1, 1962, or such earlier date as Station KERO-TV may cease operation on Channel 10 at Bakersfield. 21 Pike & Fischer, R.R. 1549. This is final Commission action, with only "formal codification to be accomplished by subsequent order". 21 Pike & Fischer, R.R. 1573. As such, it is appealable and now pending before the Court of Appeals. Transcontinent Television Corp. v. U.S., Case No 16,541, C.A.D.C. Obviously, any moratorium on deintermixture would and should be inapplicable to this final Commission action.

If, however, the case were remanded to the Commission for any reason, the question would arise whether Commission reconsideration should be precluded by a general moratorium. We believe that it should not. For, reconsideration in such circumstances stands on a different ground than a new proposal for deintermixture in some area. Cf. Section 402(h) of the Act. Even more important, a moratorium affecting Bakersfield would leave Commission action in this general area (the San Joaquin Valley) in the state of being half complete, half incomplete, and would have seriously adverse consequences on the development of television in the San Joaquin Valley and particularly in the Fresno area. In Fresno, deintermixture action by the Commission is complete, and Fresno Station KFRE-TV has shifted from operation on VHF Channel 12 to UHF operation (see FCC 60-814, 60-279). One of the important aims in the Bakersfield case was to complement the Fresno action. As the Commission stated (21 Pike & Fischer, R.R. at pp. 1554-56):

> "7. The potential for the growth and development of multiple effective local outlets and services in the San Joaquin Valley would be much greater if all television assignments at Bakersfield were in the UHF band. With Bakersfield and Fresno, the two largest expanding population centers of the Valley located about 105 miles from each other, and with their trading

and market areas extending into the Valley between them, where also are located a number of smaller cities where the chances for the establishment of local television outlets are promising, it is inevitable, under the favorable terrain and propagation conditions in the Valley, that there is and will be an overlapping of services and a sharing of a common audience by all stations operating at Fresno and Bakersfield or in cities between them. It has been demonstrated that the relatively flat Valley floor presents unusually favorable conditions for propagation of television signals. Marietta itself pointed out in comments filed in Docket No. 11759 that the 'unique character of the extremely flat and quite treeless San Joaquin Valley, which permits signals to be rolled down the corridor from Bakersfield toward Fresno and from Fresno toward Bakersfield in the manner of a bowling ball, exceeding substantially the normal propagation distances in other areas, is a phenomenon which cannot be ignored.' By virtue of these circumstances, it is essential, we believe, that we make conditions conducive throughout the Valley for the growth and successful operation of local outlets by providing an equal opportunity for all Valley stations to compete effectively with compatible facilities."

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"10. With our action removing VHF Channel 12 from Fresno and shifting Station KFRE-TV on that channel to UHF operation, all television assignments and stations in the Valley are now in the UHF band with the exception of Station KERO-TV on Channel 10 at Bakersfield. At the present time only three stations are operating at Fresno and three at Bakersfield, but there is demand and promise that additional outlets will soon be established at Fresno, and at Tulare, Visalia and Hanford, which are located in the Valley between Fresno and Bakersfield. /Footnote omitted./ The predicted Grade B signal of the VHF Channel 10 station at Bakersfield (KERO-TV) extends well beyond Tulare, Visalia, and Hanford where local UHF stations are now contemplated, penetrates the service areas of the Fresno UHF stations, and

reaches to within 23 miles of Fresno. There can be no doubt, however, that under the excellent propagation conditions in the Valley, its signal penetrates even farther north in the Valley. The Nielsen Coverage survey for the spring of 1958 indicates that Station KERO-TV at Bakersfield reaches and is listened to in homes in Madera County, which is north of Fresno County and principally served by Fresno stations. The 1960 American Research Bureau, Inc., Television Coverage Study of California counties and stations indicates that about 96% of the television homes in both Tulare and Kings Counties (Tulare and Visalia are in Tulare County and Hanford in Kings County) and about 58% of the TV homes in Fresno County are able to receive Station KERO-TV and that Station KERO-TV's net weekly circulation (number of TV homes viewing Station KERO-TV at least once a week) in Tulare County is about 93%, in Kings County about 83%, and in Fresno County about 30%.

"11. Although our removal of the single VHF outlet at Fresno puts all Fresno stations on a comparable competitive footing which we believe will increase the potential for the growth of healthy competitive services in the Fresno area, we cannot agree with Marietta that deintermixture of the Fresno market can be fully effective notwithstanding its VHF station at Bakersfield. With a VHF outlet at Fresno no longer dominating the Fresno market, there is considerable merit, we believe, to the claim of proponents for UHF-deintermixture of Bakersfield that Station KERO-TV, as the only VHF station in the Valley, would be in a position of conspicuous and unjustifiable dominance over all the competing UHF stations in the Valley. This factor and the extent to which Station KERO-TV's signal now penetrates beyond cities between Bakersfield and Fresno where the establishment of additional local UHF outlets is the most promising and into the service areas of the Fresno stations convincingly indicate that the presence of this VHF station in the adjacent Bakersfield market constitutes a significant deterrent to effective

> and comparable UHF competition in the Fresno market area and to the establishment of effective and beneficial new services, particularly in the smaller cities of the Valley. The deterrent would be compounded if Bakersfield were made principally all-VHF by the addition of two more VHF outlets, as Marietta suggests, and three Bakersfield VHF stations were to provide service in this now all-UHF area. Complete deintermixture of the entire San Joaquin Valley to UHF is, in our judgment, required for full development and expansion of effective competitive television service throughout the Valley."

On this ground also, therefore, Bakersfield should not come within any general deintermixture moratorium but rather should be left to Commission judgment, in the event that reconsideration is called for at some future date.

4. The Evansville deintermixture proceeding (Docket No. 11757). On March 1, 1957 the Commission issued a Report stating its "judgment that amendment of the Table of Assignments for Television Broadcast Stations (Section 3.606(b) of the Commission's Rules) by shifting Channel 7 from Evansville, Indiana to Louisville, Kentucky; assigning Channel 31 to Evansville; substituting Channel 78 for Channel 31 in Tell City, Indiana; shifting Channel 9 from Hatfield, Indiana to Evansville where the channel is to be reserved for noncommercial educational use; and by unreserving Channel 56 and shifting it from Evansville to Owensboro, Kentucky, would promote the public interest, convenience and necessity." The Commission effected the changes as to Channel 9 but not those involving Channel 7. Because there was an outstanding authorization for operation of Station WTVW on Channel 7 in Evansville, the Commission instituted show cause proceedings to modify Station WTVW's permit to specify operation on Channel 31.

The Commission's action shifting Channel 9 from Hatfield to Evansville (for noncommercial educational use) was sustained upon review in court. Owensboro-on-the-Air, Inc. v. U.S., 262 F. 2d 702 (C.A.D.C.). As to the show cause proceeding, the Examiner on July 20, 1961

issued an initial decision recommending that Channel 7 be deleted from Evansville and reassigned to Louisville and that WVTW's permit be modified to specify operation on UHF Channel 31 (FCC 61D-113). Oral argument on the exceptions to the initial decision will be heard by the Commission on March 29th.

Again, we think it apparent that no general moratorium should be applicable to the Evansville area situation. Half the Commission's action in this area is final (i.e., shifting Channel 9 to noncommercial operation); the other half -- whether Channel 7 should be shifted to Louisville to complete the deintermixture of the area and provide Louisville with a third VHF facility -- is nearing final decision after a lengthy adjudicatory proceeding. Clearly the judgment as to whether the public interest would be served by such action should be made by the Commission upon the basis of the voluminous adjudicatory record compiled -- and not by automatic application of a general moratorium.

Significantly, Senator Capehart, who opposed deintermixture of Evansville in testimony given before the Examiner (par. 95, Init. Dec., FCC 61D-113), concurs in this conclusion. For, while supporting the provision of H.R. 9267 (the Roberts bill) precluding Commission deintermixture, he further stated:

> "So that there can be no misunderstanding, I do not take this position in connection with any case that is under adjudication before the FCC. Specifically, my views do not apply to the situation in Evansville where Channel 7 has been earmarked for a move for a very long time. The legislative decision in this case was made some years ago. What concerns me is future legislation, or rule making, decisions. I think it is proper for me to express my views on such matters, while I should be reluctant to do so as to cases under adjudication." (Statement before Subcommittee on Communications, Senate Commerce Committee.)

MEMORANDUM CONCERNING THE PROPOSED AMENDMENT TO THE COMMUNICATIONS ACT TO EMPOWER THE FEDERAL COMMUNICATIONS COMMISSION TO REGULATE THE PERFORMANCE CHARACTERISTICS OF TELEVISION RECEIVERS (S. 2109 AND H.R. 8031, 87TH CONGRESS)

As the proposed comments of the Department of Commerce recognize, the Commission has been faced with a most difficult and important problem in carrying out its statutory mandate to provide for the most efficient and widespread use of television broadcasting. Despite the hopes and best efforts of the Commission, there are not enough operating television broadcast stations to provide an efficient nationwide television service with sufficient local outlets, adequate educational facilities and effective competition. For example, we have fallen far short of our goal of having at least four commercial stations and one educational station in each of the top 100 markets. We have also been unable to provide television outlets in as many other communities as we had intended. Moreover, the number of operating commercial television stations has remained relatively stable in recent years (471 in January 1959, 530 in January 1960), despite a steady upward trend in the economic indices in the industry (e.g., total broadcast revenues increased from $897 million in 1956 to $1,269 million in 1960).

This situation results from the fact that almost all of our television service emanates from stations operating on the 12 VHF channels, while the 70 UHF channels are very sparsely occupied. Thus, of a present total of 535 operating commercial television stations, only 79 are operating on UHF channels. Moreover, 99 commercial UHF stations which were on the air at one time are no longer operating. The failure of UHF to develop satisfactorily has, in turn, been caused in large part by the scarcity of television receivers which are capable of tuning to UHF stations. This scarcity of UHF receivers grows steadily worse. Thus, while 20.2% of television receivers produced in 1953 were equipped to receive UHF stations, only 7.5% of the receivers produced in 1960 were so equipped. The vicious cycle is then completed. Scarcity of UHF receivers places UHF stations at a significant disadvantage with competing VHF stations, due to limited potential audiences. As a consequence, advertisers naturally prefer VHF outlets with assured audiences. It has been amply demonstrated that the public will not purchase UHF sets absent more UHF stations; absent UHF receivers in the hands of the public, there will be no increase in UHF commercial broadcasting.

I can assure you that since 1954 the Commission has given most serious and comprehensive study to this allocations problem and the possible solutions to it. Both the Commission and its

not the status of television receivers as articles being shipped in interstate commerce, but rather the vital effect such receivers have on television broadcasting. I therefore believe the important question is the soundness of the Commission's conclusion that enactment of this legislation is essential to protecting the interest of the public in this important instrumentality of interstate commerce. Certainly, if that conclusion is a sound one, the public interest in the use of this instrumentality should not be frustrated by the fact that public health or safety is not involved. I would add that, in any event, enactment of this legislation need not constitute a precedent for general Federal Government regulation of manufactured products where public health or safety is not involved, because in this instance we are concerned with a unique case involving effective utilization of a limited and invaluable national resource, i.e., the radio frequency spectrum.

Your proposed report also notes that the public would be required to pay the increased cost of all-channel receivers even if UHF service is not available in a particular area. The increased cost would also allegedly deter the sale of television receivers. All-channel receivers will undoubtedly cost more, at least at the outset. The best available information indicates an initial increase in the neighborhood of $25, and that, when the benefits of mass production and other possible production and design improvements are fully realized, the price differential should be $15 or less.

We believe the exact impact of the price increase on the sale of television receivers is difficult to measure. For the following reasons, however, we do not think the impact will be significant. Experience indicates that many factors influence the volume of television receiver sales, of which price is only one. Price elasticity is apparently not great in this area and small fluctuations in price, such as the one here involved, should not result in significant changes in demand. Changes in general economic conditions are probably more important than small price changes. Moreover, we are here dealing with an almost saturated market, since 89% of U.S. homes how have at least one television receiver. Most receivers sold today are therefore replacements or additions. This being so, various factors aside from the price of the receiver appear to be important, e.g., the desire for portables or larger picture sizes, repair costs, the need for a second set, etc. It is not to be expected that persons who have been receiving television will be significantly deterred by a small price increase in replacing their sets when they no longer give satisfactory

service. Finally, the additional service from new UHF stations, both educational and commercial, will furnish a stimulus to the purchase of receivers (including the replacement of old receivers) to counterbalance and, in the long run, completely overcome, any possible deterrent effect of a price increase.

It, therefore, seems reasonable to conclude that the small increase in price will not have a serious impact on receiver sales. We also fully expect that there will be UHF service in more areas and that the purchasers of all-channel sets will receive increased television service. However, to the extent enactment of this legislation may result in some detriment to receiver manufacturers or to individual purchasers of receivers, we believe that any such detriment will be far outweighed by the important benefits to the public interest which will result.

I would also add that the electronics industry as a whole would be in a position to benefit affirmatively from this legislation in several respects. The Commission expects that enactment of this legislation will result in a considerable increase in the number of UHF television stations in operation. This is calculated to stimulate significantly the sale of UHF converters to persons with VHF-only sets, as well as the sale of all-channel receivers. Some persons will also need special UHF receiving antennae. In addition, the new UHF stations will require a wide variety of equipment including transmitters, transmitting antennae, studio and monitoring equipment, etc.

Finally, we come to the question of the impact of this legislation on export of television receivers. Your report points out that in order to compete in foreign markets domestic receiver manufacturers must be able to export receivers taken from the domestic production lines. Based upon our understanding of the facts, we do not believe that the proposed legislation will present a problem in this regard. Some all-channel receivers are being produced at the present time. This is done merely by inserting a separate UHF tuner in addition to the VHF tuner and the all-channel receivers can be manufactured on the same production line as the VHF-only receivers. If the legislation is enacted, there would appear to be no reason why VHF-only receivers for export could not be produced on the same assembly line as all-channel receivers, with the UHF tuners merely being omitted in the former.

There has been some speculation that, if the legislation is enacted, a single, all-channel tuner will be developed and that the single production line for domestic and export models would not then be possible. This suggestion is, at most, in

the realm of speculation. Moreover, there are some sound, practical reasons for doubting that an all-channel tuner will be used. There is a considerable gap between the UHF and VHF portions of the spectrum allocated for television broadcasting. Therefore, any all-channel tuner would have to cover an extremely wide frequency range. In view of these facts, it is our belief that good design from an engineering standpoint calls for separate tuners, and, in addition, that an all-channel tuner would be very costly.

It therefore appears that this legislation should not be a significant deterrent to the export of television receivers. In any event, we believe the highly speculative effect on the export market must be balanced against the very real and important benefits to the public interest.

Let me make an additional point which has particular applicability to possible effects which this proposal may have on the cost of manufacturing television receivers. If this legislation is enacted, the Commission will have to promulgate rules prescribing the performance capabilities for television receivers. Let me assure you that before such standards are adopted, the Commission will, in accordance with the provisions of the Administrative Procedure Act, conduct rulemaking proceedings in which all interested parties, including your Department, the receiver manufacturers, and the public will have full opportunity to present to the Commission all pertinent facts and arguments concerning costs, production problems, etc. Most carefull consideration, will, of course, be given to all such material which is submitted, so that the standards that are established not only achieve the desired public interest goals, but are also realistic in terms of the problems faced by the industry.

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